Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of the Joint Application of Matrix Telecom, Inc. Matrix Telecom of Virginia, Inc. Assignees, and Comtel Telcom Assets LP Comtel Virginia, LLC Assignors For Grant of Authority Pursuant to Section 214 of the Communications Act of 1934, as amended, and Sections 63.04, and 63.24 of the Commission's Rules to Complete an Assignment of Assets of Authorized Domestic and International Section 214 Carriers	)	WC Docket No. 10-82

(CORRECTED) REPLY COMMENTS OF COMTEL TELCOM ASSETS LP AND COMTEL VIRGINIA LLC TO COMMENTS OF HYPERCUBE TELECOM, LLC

To: The Commission

Date: April 20, 2010

Signature Block Corrected and Refiled:
Date April 22, 2010

James H. Lister
Charles R. Eberle
Birch, Horton, Bittner and Cherot, P.C.
1155 Connecticut Avenue, N.W., Suite 1200
Washington, D.C. 20036
Telephone: (202) 659-5800
Facsimile: (202) 659-1027
jlister@dc.bhb.com
ceberle@dc.bhb.com

Co-Counsel for Comtel Telcom Assets LP and Comtel Virginia LLC, Assignors

SUMMARY OF REPLY COMMENTS

Pursuant to Public Notice DA-10-583 (March 31, 2010), Comtel Telcom Assets LP and Comtel Virginia LLC (collectively, "Comtel"), through counsel, hereby reply to the Comments of Hypercube Telecom, LLC ("Hypercube") filed on April 14, 2010 in this docket.

Hypercube is merely trying to hijack the Section 214 process in a thinly veiled attempt to gain leverage in its litigation with Comtel, not raise any genuine public interest concerns. Hoping to disrupt the acquisition of Comtel's business by Matrix Telecom, Inc. and Matrix Telecom of Virginia, Inc. ("Matrix" and the "Transaction") for its own financial interests, Hypercube in its Comments (1) attempts to inject an entirely unrelated commercial dispute regarding Hypercube's unjust and unreasonable CLEC insertion scheme into this Section 214 transfer proceeding, and (2) provides grossly inaccurate and incomplete information to the Commission.

Hypercube's Comments contain numerous inaccuracies and omissions regarding its ongoing dispute with Comtel, including noticeably failing to mention a significant Federal court ruling dismissing much of Hypercube's lawsuit against Comtel. Contrary to Hypercube's unfounded assertions, Comtel has paid all of its USF obligations that are due. Moreover, despite Hypercube's hollow "concern" about Comtel not paying vendors, the fact is Comtel has paid in excess of $110 million annually to over 800 telecommunications vendors and/or vendor accounts for ***legitimate*** telecommunications services in 2007, 2008, and 2009. Comtel (and several other IXCs) disputes Hypercube's traffic pumping scheme, however. Comtel has exercised its right

under the Commission's *7th and 8th Report and Orders* in the CLEC Access Charges Docket to decline to purchase Hypercube's over-priced and unnecessary service.[1]

Hypercube's "arguments" are improper and irrelevant in a Section 214 proceeding. Hypercube's Comments fail to raise any issues concerning competition or consumer protection issues related to the assets being transferred, and Hypercube also fails to raise any issues regarding the fitness of Matrix to acquire and operate the assets being transferred. In short, Hypercube is making a last ditch effort to save its failing CLEC insertion scheme, and the Commission should not fall for it. Instead, the Commission should expeditiously approve the Transaction without the unjustified and unnecessary conditions Hypercube self-servingly proposes.

[1] *See Seventh Report and Order and Further Notice of Proposed Rulemaking, In the Matter of Access Charge Reform*, 16 FCC Rcd. 9923, 9960 (2001) ("*7th Report and Order*"); *Eighth Report and Order and Fifth Order on Reconsideration*, 19 FCC Rcd. 9108, 9137-38 (2004) ("*8th Report and Order*"); *see also* Point II.A.1 below.

TABLE OF CONTENTS

PAGE

B. Texas PUC Staff Recommendation in *Hypercube v. Level 3*, Docket No. 37599 (Texas PUC) (March 30, 2010).

C. Proposed Decision Granting Motion to Dismiss, *Hypercube Telecom, LLC v. Level 3 Communications, LLC*, Case No. 09-05-009 (Cal. Public Utility Commission) (April 16, 2010).

D. *Order, DeltaCom, Inc. v. Hypercube, LLC*, Case No. MC-10-J-465-S (U.S.D.C. N.D.Ala, March 30, 2010) (ECF Doc. 4).

E. *Order, Hypercube, LLC v. Comtel Telcom Assets LP*, Case No. 08-CIV-7428 (U.S.D.C. S.D.N.Y, Dec. 23, 2008) (ECF Doc. 22)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of the Joint Application of Matrix Telecom, Inc. Matrix Telecom of Virginia, Inc. Assignees, and Comtel Telcom Assets LP Comtel Virginia, LLC Assignors For Grant of Authority Pursuant to Section 214 of the Communications Act of 1934, as amended, and Sections 63.04, and 63.24 of the Commission's Rules to Complete an Assignment of Assets of Authorized Domestic and International Section 214 Carriers	)	WC Docket No. 10-82

REPLY COMMENTS OF COMTEL TELCOM ASSETS LP AND COMTEL VIRGINIA LLC TO COMMENTS OF HYPERCUBE TELECOM, LLC

Pursuant to Public Notice DA-10-583 (March 31, 2010), Comtel Telcom Assets LP and Comtel Virginia LLC (collectively, "Comtel"), through counsel, hereby reply to the Comments of Hypercube Telecom, LLC ("Hypercube") filed on April 14, 2010 in this docket.

Hypercube is merely trying to hijack the Section 214 process in a thinly veiled attempt to gain leverage in its litigation with Comtel, not raise any genuine public interest concerns. Hoping to disrupt the acquisition of Comtel's business by Matrix Telecom, Inc. and Matrix Telecom of Virginia, Inc. ("Matrix" and the "Transaction") for its own financial interests, Hypercube in its Comments (1) attempts to inject an entirely unrelated commercial dispute regarding Hypercube's unjust and unreasonable CLEC insertion scheme into this Section 214

transfer proceeding, and (2) provides grossly inaccurate and incomplete information to the Commission.

Hypercube's Comments contain numerous inaccuracies and omissions regarding its ongoing dispute with Comtel, including noticeably failing to mention a significant Federal court ruling dismissing much of Hypercube's lawsuit against Comtel. Contrary to Hypercube's unfounded assertions, Comtel has paid all of its USF obligations that are due. Moreover, despite Hypercube's hollow "concern" about Comtel not paying vendors, the fact is Comtel has paid in excess of $110 million annually to over 800 telecommunications vendors and/or vendor accounts for ***legitimate*** telecommunications services in 2007, 2008, and 2009. Comtel (and several other IXCs) disputes Hypercube's traffic pumping scheme, however. Comtel has exercised its right under the Commission's *7th and 8th Report and Orders* in the CLEC Access Charges Docket to decline to purchase Hypercube's over-priced and unnecessary service.[2]

Hypercube's "arguments" are improper and irrelevant in a Section 214 proceeding. Hypercube's Comments fail to raise any issues concerning competition or consumer protection issues related to the assets being transferred, and Hypercube also fails to raise any issues regarding the fitness of Matrix to acquire and operate the assets being transferred. In short, Hypercube is making a last ditch effort to save its failing CLEC insertion scheme, and the Commission should not fall for it. Instead, the Commission should expeditiously approve the Transaction without the unjustified and unnecessary conditions Hypercube self-servingly proposes.

---

[2] *See Seventh Report and Order and Further Notice of Proposed Rulemaking, In the Matter of Access Charge Reform*, 16 FCC Rcd. 9923, 9960 (2001) ("*7th Report and Order*"); *Eighth Report and Order and Fifth Order on Reconsideration*, 19 FCC Rcd. 9108, 9137-38 (2004) ("*8th Report and Order*"); *see also* Point II.A.1 below.

I. THE COMMISSION SHOULD APPROVE THE APPLICATION PURSUANT TO SECTION 214

A. Hypercube's Comments are not Relevant to the 214 Application

Section 214(a) of the Communications Act (the "Act")[3] requires the Commission to find that the proposed transfer of control will serve the public interest, convenience, and necessity.[4] Opponents seeking to block or delay proposed transactions have a high burden of proof to justify Commission intervention. Hypercube's unsubstantiated speculation that Matrix's acquisition of Comtel will somehow enable Comtel or Matrix to evade the requirements of the Act are without merit and have no place in a Section 214 proceeding.

Hypercube states that it is "concerned" about the acquisition of Comtel's business by Matrix due to an unrelated dispute between Hypercube and Comtel and requests that the Commission attach several conditions to its approval of the Transaction. However, Hypercube sticks to speculative, general accusations and does not allege that the Transaction will result in a single specific violation of the Act or any Commission rule. The Commission's public interest assessment must consist of "a balancing test weighing any potential public interest harms of a proposed transaction against any potential public interest benefits to ensure that, on balance, the proposed transaction will serve the public interest."[5] Hypercube has made no showing that the proposed Transaction would be adverse to the public interest, violate the Act, frustrate the implementation of the Commission's rules, or otherwise cause harm to existing competition. Hypercube is merely trying to substitute its interest for the public interest.

---

3 47 U.S.C. § 214(a).

4 *See, e.g., IT&E Overseas, Inc., Transferor and PTI Pacifica, Inc., Transferee*, Memorandum Opinion and Order and Declaratory Ruling, 24 FCC Rcd. 5466, 5472 (2009) ("*IT&E/PTI Pacifica Order*"); *Applications Filed for the Transfer of Certain Spectrum Licenses and Section 214 Authorizations in the States of Maine, New Hampshire, and Vermont from Verizon Communications, Inc. and Its Subsidiaries to FairPoint Communications, Inc.*, Memorandum Opinion and Order, 23 FCC Rcd. 514, 519 (2008).

5 *Verizon Communications, Inc. and MCI, Inc., Applications for Approval of Transfer of Control*, 20 FCC Rcd. 18433 (2005) ("*Verizon/MCI Order*").

As discussed in the Application filed in this docket on March 22, 2010, which seeks domestic and international Section 214 approvals (the "Application"), the proposed transaction will serve the public interest by ensuring that Comtel's customers continue to receive quality, uninterrupted interstate and international telecommunications services. Matrix is an established competitive provider of integrated communications services that is well suited to serving Comtel's customers. The combined companies will have significant resources that will enable continued quality service to Comtel's customers.

1. The Ongoing Dispute Over Hypercube's Unjust and Unreasonable Practices is Unrelated to this Transaction

Hypercube argues that Comtel refusing to pay Hypercube for the unlawful charges sought by Hypercube's illegitimate CLEC insertion scheme "raises serious doubts as to whether the proposed asset sale is in the public interest."[6] That dispute, discussed in detail below, has no relevance to this Section 214 proceeding and is being adjudicated in separate, more appropriate proceedings.

The Commission does not address claims in Section 214 proceedings that are not specific to the transaction at issue.[7] The Commission has consistently denied attempts by third parties to disrupt business transactions by turning the Section 214 process into a "forum to address or influence various disputes with one or the other of the applicants that have little if any relationship to the transaction or to the policies and objectives of the Communications Act."[8] The Commission will not consider harms alleged by third parties that do not directly "arise from

---

6 Hypercube Comments at 2-4.

7 *Verizon Communications, Inc., Transferor, and America Movil, S.A. DE C.V., Transferee, Application for Authority to Transfer Control to Telecomunicaciones de Puerto Rico, Inc. (TELPRI)*, Memorandum Opinion and Order, 22 FCC Rcd 6195, 6206-07 (2007) (*citing Verizon/MCI Order*, 20 FCC Rcd at 18529.

8 *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, 16 FCC Rcd 6547, 6550 (2001) ("*AOL/Time Warner Order*").

the transaction"[9] and any objections must be limited to "harms and benefits that are 'merger-specific'."[10] The Commission clearly summarized this position in the *AOL/Time Warner Order*:

> The Commission recognizes and discourages the temptation and tendency for parties to use the license transfer review proceeding as a forum to address or influence various disputes with one or the other of the applicants that have little if any relationship to the transaction or to the policies and objectives of the Communications Act.[11]

Matrix's acquisition of the Comtel business will have no impact on the Hypercube/Comtel dispute.[12] Nor does the Transaction in any way relate to the previously-resolved (and fully paid) Universal Service Fund contribution matter cited by Hypercube.

The Commission does not allow its consideration of a straightforward Section 214 application to be sidetracked by unrelated issues. Hypercube should know this. Hypercube itself cited these same Commission precedents in response to AT&T's objection to Hypercube's acquisition of KMC Data.[13] In that case, Hypercube stated that "[i]n an attempt to resolve disputes unrelated to the transaction, AT&T is trying to hold this proceeding hostage."[14]

Commission precedent also makes clear that the transaction approval process cannot be used to address pending complaints or issues that have not yet been adjudicated.[15] When ruling on Section 214 applications, "[t]he Commission has regularly declined to consider in merger

---

9 *Verizon/MCI Order* at 18446; *IT&E/PTI Pacifica Order* at 5474.

10 *AOL/Time Warner Order* at 6550.

11 *Id*.

12 If anything, it will have a favorable affect for Hypercube by capping the amount in dispute at the amounts purportedly invoiced by Hypercube up to consummation of the Transaction.

13 *Application of Hypercube, LLC and KMC Data LLC*, WC Docket No. 06-20, Reply Comments (filed Feb. 21, 2006).

14 *Id*. at 2.

15 *See, e.g., Application of General Electric Co.*, Memorandum Opinion and Order, 3 FCC Rcd 2803, 2810 (1988) ("It would be premature for us to deny the proposed transfer of control or impose conditions merely on the basis of pleadings raising issues that have not yet been adjudicated."); *Bell Atlantic Mobile Systems, Inc. and NYNEX Mobil Communications Company Application for Transfer of Control of Eighty-two Cellular Radio Licenses to Cellco Partnership*, Order, 10 FCC Rcd 13368, 13379-80 (1995) ("the proper forum for specific complaints against common carriers is a Section 208 complaint proceeding, not a license assignment/transfer of control proceeding"), *aff'd* 12 FCC Rcd 22280 (1997).

proceedings matters that are the subject of other proceedings before the Commission because the public interest would be better served by addressing the matter in the broader proceeding of general applicability."[16] The dispute over Hypercube's unlawful charges is the subject of pending litigation in the U.S. District Court for the Northern District of Texas. Pending that Court's order on Comtel's motion for primary jurisdiction referral, certain issues related to the dispute are before the Commission in Comtel's informal complaint against Hypercube (File No. EB-09-MDIC-0028), and may also come before the Commission in the form of a formal complaint by Comtel against Hypercube. Hypercube cannot jump to exercising remedies before a determination that any violation has occurred. It must resolve its claims in those adjudicatory proceedings rather than by attempting to derail a business transaction that serves the public interest by providing consumers with continued quality telecommunications services.

B. Hypercube Focuses Exclusively on Comtel, the Transferor, Failing to Give Consideration to the Qualifications of Matrix, the Transferee

Hypercube's objections to the Transaction are based entirely on allegations leveled against Comtel, despite the fact that the end result of the Transaction will be that Matrix, the transferee, will be the surviving entity. Hypercube even concedes that it believes that "Matrix is a responsible and conscientious member of the nation's telecommunications network,"[17] but nonetheless insists that a transfer of assets to Matrix is fraught with some terrible yet non-specified risk.

Hypercube fails to explain how Comtel's past practices have any relevance to the future business conduct of Matrix after the acquisition. In evaluating assignment and transfer

---

[16] *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Southern New England Telecommunications Corp., Transferor to SBC Communications, Inc., Transferee*, 13 FCC Rcd. 21292, 21306 (1998) (declining to consider Omnipoint's allegation that SBC was failing to provide billing and collection services necessary to support a national calling party pays service).

[17] Hypercube Comments at 6.

applications, the Commission does not re-evaluate the qualifications of the transferor "unless issues related to basic qualifications have been designated for hearing by the Commission or have been sufficiently raised in petitions to warrant the designation of a hearing."[18] Hypercube's allegations against Comtel do not satisfy this standard.

C. There is no Justification for Attaching Conditions to the Approval

Despite acknowledging Matrix's fitness to acquire and operate the assets, Hypercube nonetheless asks the Commission to include several unnecessary and burdensome conditions to its approval of the Transaction.[19] The conditions sought by Hypercube have no relevance to the Transaction, serve only Hypercube's private interest (and not the public interest), and include remedies well beyond the scope of a Section 214 proceeding. The Commission's position on attaching conditions to Section 214 approvals is clear:

> [T]he Commission has held that it will impose conditions only to remedy harms that arise from the transaction (*i.e.*, transaction-specific harms) and that are related to the Commission's responsibilities under the Communications Act and related statutes. Thus, we will not impose conditions to remedy pre-existing harms or harms that are unrelated to the transaction.[20]

Hypercube requests several conditions aimed at resolving the unrelated dispute over its unjust and unreasonable practices, including conditioning approval of the Transaction on resolution of that dispute, establishing an escrow fund to pay potential remedies resulting from the dispute, and mandating that Matrix agree to interconnection agreements with Hypercube so that Hypercube may continue to subject Comtel's customers to its illegitimate CLEC insertion practices. These conditions are completely outside the scope of this Section 214 proceeding,

---

[18] *Verizon/MCI Order* at 18526.

[19] Hypercube Comments at 6-8.

[20] *Verizon/MCI Order* at 18445; *see also SBC Communications, Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, 20 FCC Rcd 18290, 18303 (2005).

against public policy, and seek to undermine the jurisdiction of the Federal District Court forum—a forum chosen by Hypercube. *See* Point II.C. below.

D. The Transaction is Eligible for Streamlined Processing

Hypercube also requests that the Transaction be removed from the streamlined process. However, Hypercube does not dispute that the Transaction satisfies the prerequisites for streamlined processing in Section 63.03(b)(2)(i) of the Commission's Rules.[21] Following the approved transfer, Matrix will have a market share in the interstate, interexchange market of less than ten percent, will provide competitive telephone exchange services or exchange access services exclusively in geographic areas served by a dominant local exchange carrier that is not a party to the transaction, and neither Matrix nor Comtel is dominant with respect to any service. The Application also satisfies the requirements for streamlined processing with respect to international authority because none of the exclusionary criteria in Section 63.12(c) of the Commission's Rules apply.[22]

II. HYPERCUBE'S COMMENTS CONTAIN NUMEROUS INACCURACIES AND OMISSIONS AND DO NOT JUSTIFY THE CONDITIONS IT SEEKS TO IMPOSE

A. Hypercube's Private Claims Lack Merit, as Its Litigation Results to Date Reflect

In addition to being irrelevant to the public interest issues the Commissions considers in a Section 214 transfer application, Hypercube's private litigation claims against Comtel lack merit, as its litigation results to date reflect. The three IXCs that Hypercube is actively pursuing in various actions (Comtel, Level 3 Communications, LLC ("Level 3"), and DeltaCom, Inc.

[21] *See* Application at 2.

[22] *Id*. *See also* 47 CFR 63.12(c).

("DeltaCom")) have been successful so far in defending Hypercube's meritless claims for access charges pending in multiple forums throughout the United States.

In each case, Hypercube begins by signing "revenue sharing agreements" with wireless carriers relating to 1-8XX calls dialed by wireless subscribers. Hypercube then inserts itself between the wireless carriers and the ILECs, calls itself an "originating CLEC" (even though it performs no origination services), and surreptitiously bills and collects access from unsuspecting IXCs under a purported tariff. The result is an attempted end run around the prohibition on wireless carriers collecting tariffed access charges from IXCs on any calls, including on wireless-originated 1-8XX calls.[23] Previously, those wireless carriers routed these calls to the IXCs in more efficient ways not involving Hypercube, but now they route them through Hypercube in exchange for a share of the access revenue. The Commission's orders clearly bar wireless carriers from imposing access charges on IXCs absent agreement with the IXC.[24] Wireless carriers instead charge their consumer customers for placing 1-8XX calls just like any other calls (the 1-8XX minutes typically count against the wireless subscriber's monthly minute allowance).

The results of the litigation against Comtel, Level 3, and DeltaCom have not been favorable to Hypercube:

1. *Hypercube v. Comtel*, N.D. Texas (September 25, 2009).

On September 25, 2009, Senior District Judge A. Joe Fish of the U.S. District Court for the Northern District of Texas ***dismissed*** Hypercube's federal tariff claims against Comtel for the time period March 3, 2006 to March 31, 2009. That three-year time period accounts for the bulk

[23] *Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, 17 FCC Rcd. 13192, 13196-97 (2002).

[24] *Id.*

of the $3.8 million of charges Hypercube claims Comtel owes. Judge Fish held that, during that time, "Hypercube was relying on an invalid tariff, upon which it cannot file suit."[25]

Judge Fish further found that, even with respect to time periods in which it had a tariff in place, Hypercube cannot rely on the FCC's *7th and 8th Reports and Orders* to force Comtel (referred to by its trade name "Excel") to buy Hypercube's "services" unless those "services" add value to the telecommunications network.[26] Judge Fish notably concluded:

> In other words, if removing Hypercube from the chain of carriers would not disturb the flow of a customer's call, Excel is not required to purchase its services. A company that provides no additional value to anyone may not unnecessarily insert itself into a chain of carriers and take advantage of the FCC's decision that IXCs must pay LECs.[27]

Whether Hypercube "adds value" is at issue in the Texas litigation. Judge Fish also noted that a CLEC cannot require an IXC to purchase its service if its rates exceed ILEC rates, a separate issue being litigated.[28] Comtel's traffic studies show Hypercube's rates exceed ILEC rates.[29] Tellingly, Hypercube in its comments on Comtel's Section 214 transfer application informs the Commission that Hypercube has filed a collection action under "state and federal tariffs" for $3.8 million in "lawfully assessed access charges," yet fails to mention the Court's ruling that Hypercube was relying on an "invalid tariff" for most of those charges, and that it is not permitted to collect on the rest absent a showing of "adding value."[30] Hypercube also does not

---

[25] *Hypercube LLC v. Comtel Telcom Assets LP*, 2009 WL 3075208, No.3:08-CV-2298-G-AH (N.D. Tex., Sept. 25, 2009) at *4 (copy attached as Exhibit A to these Reply Comments). Hypercube has moved for reconsideration.

[26] *Id*. at *5, *7; *see Seventh Report and Order and Further Notice of Proposed Rulemaking, In the Matter of Access Charge Reform*, 16 FCC Rcd. 9923 (2001) ("*7th Report and Order*"); *Eighth Report and Order and Fifth Order on Reconsideration*, 19 FCC Rcd. 9108 (2004) ("*8th Report and Order*").

[27] *Hypercube v. Comtel*, 2009 WL 3075208, at *7 (Exhibit A to these Reply Comments).

[28] *Id*. at *6.

[29] Other issues in the case include, but are not limited to, Hypercube's back-up *quantum meruit* claim and Hypercube's claim that Comtel placed a constructive order for service.

[30] *See* Hypercube Comments at 2, 3; *Hypercube v. Comtel*, 2009 WL 3075208 at *6-7 (Exhibit A hereto).

mention the fact that Comtel has on numerous occasions informed Hypercube that it does not want Hypercube's services.[31] Hypercube's selective omissions distort the truth.

2. *Hypercube v. Level 3*, Texas PUC Staff Recommendation (March 29, 2010)

On March 29, 2010, the Staff of the Texas Public Utility Commission ("Texas PUC") recommended that the Texas PUC dismiss Hypercube's similar collection complaint against Level 3 for intrastate access charges.[32] The Staff explains that Hypercube is paying wireless carriers a portion of the access charges collected from IXCs in exchange for the wireless carriers agreeing to route 1-8XX calls through Hypercube.[33] Then, the Staff quotes the Commission's (FCC's) *8th Report and Order*, in which the Commission finds that CLECs cannot work with wireless carriers to end run the prohibition against wireless carriers imposing tariffed access charges on an IXC.[34] The Staff conclude that Hypercube and the wireless carriers are doing what the Commission's *8th Report and Order* forbids and so recommends dismissal of Hypercube's complaint:

> The CMRS provider cannot charge for access services absent a contract, therefore it cannot receive compensation for the access services indirectly through agreement with Hypercube to route 8YY calls. There is no claim stated upon which relief can be granted, therefore Hypercube's complaint must be dismissed.[35]

---

31 *See Hypercube v. Comtel*, 2009 WL 3075208 at *1.

32 *Commission's Staff Response to Order No. 5 and Recommendation*, Complaint of Hypercube Telecom, LLC and Level 3 Communications, Texas Public Utility Commission Docket No. 37599 at 2 (March 29, 2010) (Item No. 24) ("Texas PUC Staff Recommendation"). A copy is attached as Exhibit B to these Reply Comments.

33 Texas PUC Staff Recommendation at 2 (Exhibit B to these Reply Comments).

34 The Texas PUC Staff Recommendations quotes the following from the FCC's *8th Report and Order*: "In cases where the carrier service serving the end-user had no independent right to collect from the IXC, industry billing guidelines do not, and cannot, bestow on a LEC the right to collect charges on behalf of that carrier. For example, the Commission has held that a CMRS carrier is entitled to collect access charges from an IXC only pursuant to a contract with that IXC. If a CMRS carrier has no contract with an IXC, it follows that a competitive LEC has no right to collect access charges for the portion of the service provided by the CMRS provider. … ***We will not interpret our rules or prior orders in a manner that allows CMRS carriers to do indirectly that which we have held they may not do directly***." *8th Report and Order*, 19 FCCR 9108, 9116 and n. 57 (emphasis added).

35 Texas PUC Staff Recommendation at 3 (attached as Exhibit B to these Reply Comments).

The Texas PUC Staff is a neutral party not aligned with Level 3 or Hypercube. The Texas PUC's ALJ has been considering the Texas PUC Staff's recommendation, which goes to the heart of Hypercube's scheme. On April 16, 2010, faced with the withering Texas PUC Staff recommendation, Hypercube filed a pleading attempting to withdraw its Texas PUC complaint against Level 3.[36]

3. *Hypercube v. Level 3*, California PUC ALJ Recommendation (April 16, 2010)

On April 16, 2010, Administrative Law Judge DeAngelis of the California Public Utilities Commission ("CPUC") issued a proposed decision recommending that Hypercube's similar complaint against Level 3 before the CPUC for intrastate access charges be dismissed for failure to state a claim.[37] Judge DeAngelis cited the FCC's holding in the *8th Report and Order* that rates must be tethered to particular services. In what is rapidly becoming a theme across all of the litigation, Judge DeAngelis then explained that wireless carriers are not permitted to collect tariffed access charges, and that Hypercube may not attempt to collect access charges on behalf of them, and so Hypercube's complaint must be dismissed:

> Hypercube has not alleged that the CMRS carrier has an independent right to collect access charges from Level 3. The FCC has long held that CMRS carriers may not file tariffs for call origination or termination…[a]ccordingly, Hypercube has not alleged sufficient facts to establish its right to collect originating access charges from Level 3 on behalf of the CMRS carrier.[38]

4. *DeltaCom, Inv. v. Hypercube, LLC*, N.D.Ala. (March 30, 2010)

Hypercube's actions in Court have been marked by the same type of procedural overreaching as Hypercube's use of the Commission's Section 214 process to gain leverage in its

---

[36] Hypercube Telecom, LLC's Withdrawal of Complaint, Texas PUC Docket No. 37599 (April 16, 2010). Hypercube in this filing says it doesn't believe the Texas PUC has jurisdiction over its complaint.

[37] Proposed Decision Granting Motion to Dismiss, Hypercube Telecom, LLC v. Level 3 Communications, LLC, Case No. 09-05-009 (Cal. Public Utility Commission, April 16, 2010). A copy is attached as Exhibit C to these Reply Comments.

[38] *Id*. at 9 (attached as Exhibit C to these Reply Comments).

dispute with Comtel. On March 30, 2010, District Judge Inge Prytz Johnson of the U.S. District Court for the Northern District of Alabama quashed a subpoena for voluminous documents that Hypercube served on DeltaCom in purported support of Hypercube's suit against Comtel:

> None of the categories of the subpoenaed documents could produce information relevant to Hypercube's value to the telecommunications system. Because the court finds that Hypercube failed to establish that the discovery it seeks is relevant to its claims in the Texas action, the court is of the opinion that the motion to quash is due to be granted. Quite simply, DeltaCom does not carry the responsibility to provide support for Hypercube's business practices.[39]

5. Hypercube's Attempt at Forum Shopping was Unsuccessful

Separately, seeking some other procedural advantage, Hypercube originally filed its suit against Comtel in the Southern District of New York, where neither Hypercube nor Comtel have any offices or employees, rather than in the Northern District of Texas, where both Hypercube and Comtel have their headquarters and where the witnesses and documents are located. On December 23, 2008, District Judge Laura Taylor Swain of the Southern District of New York granted over Hypercube's opposition Comtel's motion to transfer the case to the Northern District of Texas, where it is now pending.[40]

B. Hypercube's Inaccurate Portrayal of a Consent Decree Provides No Basis for Conditioning Transaction Approval

In yet another highly inaccurate portion of its comments, Hypercube falsely alleges that the Commission and Comtel on March 18, 2010 entered into a consent decree requiring Comtel

---

[39] Order, *DeltaCom, Inc. v. Hypercube, LLC*, Case No. MC-10-J-465-S (U.S.D.C. N.D.Ala, March 30, 2010) (ECF Doc. 4) (attached as Exhibit D to these Reply Comments). In addition, Hypercube served a similar subpoena on Level 3 in purported support of Hypercube's lawsuit against Comtel. On April 12, 2010, Magistrate Judge Craig Shaffer of the U.S. District Court for the District of Colorado held a hearing on Level 3's Motion to Quash and cautioned Hypercube that the subpoena was overbroad. He invited Hypercube to withdraw it, which Hypercube did. The description of the hearing was relayed by Level 3's counsel as a transcript is not yet available. *See* Courtroom Minutes/Meeting Order, Hypercube Telecom, LLC v. Comtel Telcom Assets (Level 3 Movant), Case No. 10-cv-00513-CMA-CBS (U.S.D.C. Dist.Colo. April 12, 2010) (ECF Doc. 12).

[40] Order, *Hypercube, LLC v. Comtel Telcom Assets LP*, Case No. 08-CIV-7428 at 2 (U.S.D.C. S.D.N.Y, Dec. 23, 2008) (ECF Doc. 22) (copy attached as Exhibit E to these Reply Comments).

(in Hypercube's words) to "make[e] good on all its ***theretofore-ignored*** USF obligations."[41] However, as Hypercube should have disclosed, the Consent Decree expressly provided that Comtel ***had already paid its USF obligations in full*** before the Consent Decree was entered.[42] In fact, Comtel paid all amounts at issue long before entry of the Consent Decree. Comtel has also already paid the $25,000 voluntary contribution stated in the Consent Decree. Much to Hypercube's consternation, nothing remains owing.

The Wireline Competition Bureau can readily confirm that this was one of the lower voluntary contributions in USF cases in recent years and can contact Enforcement Bureau Staff to confirm that Comtel responded to and successfully resolved the investigation in a prompt, thorough, and responsible manner.[43] Further, in the Order approving the Consent Decree (DA 10-418), the Enforcement Bureau found that the USF investigation "raises no substantial or material questions of fact as to whether Comtel possesses the basic qualifications" to hold Commission authorizations. As noted above, Hypercube does not challenge the qualifications of Matrix to receive and operate the assets being transferred.

Neither the actual Consent Decree nor Hypercube's appallingly inaccurate description of it provides any basis for adverse action on the Application.

C. Hypercube's Request for an Escrow Fund or Other Dispute Resolution Condition in the Nature of a Pre-Judgment Attachment is Frivolous

Notwithstanding its lack of success so far in the litigation, Hypercube urges the Commission to step into Hypercube's lawsuit against Comtel pending before the District Court

---

41 Hypercube Comments at 4 (emphasis added).

42 Paragraph 3 of the Consent Decree attached to DA 10-418 provides: "Comtel paid these USF contributions that were not timely made, in part before and in part after submission of its response [to the July 28, 2008 inquiry letter]. Comtel also entered into a Tolling Agreement with the Bureau as well as subsequent extensions in order to resolve the Investigation with a Consent Decree."

43 No "willful and repeated" violation findings were made by the Bureau, although that is what is implied by Hypercube's misleading quotation of the portion of the Consent Decree describing the purposes of the investigation resolved by the Consent Decree. *See* Hypercube Comments at 3.

in Texas. It asks the Commission to condition approval of Comtel's unrelated transaction with Matrix on Comtel taking steps similar to a pre-judgment attachment or pre-judgment asset freeze injunction, such as a condition requiring escrow of cash equal to Hypercube's claims.[44] This is just another example of gross procedural and substantive over-reaching by Hypercube.

In addition to falsely stating that Comtel owes past-due USF contributions to the Commission, Hypercube (without providing any names) implies that it is just one of several telecommunications carriers with legitimate unpaid claims against Comtel.[45] Hypercube's inference that Comtel has engaged in numerous "business practices" that "raise serious issues"[46] is equally offensive and inaccurate. In reality, Comtel paid over $110 million per year to over 800 telecommunications vendors (or vendor accounts) for legitimate telecommunications service in 2007, 2008 and 2009. Comtel has not paid Hypercube because Hypercube is attempting to collect for phantom services Comtel has lawfully declined to purchase. Comtel's non-payment of Hypercube's ginned-up charges is a specific instance of justified non-payment, not a part of a broader practice of failing to pay for telecommunications service.

By making its plea for an escrow condition in the nature of a pre-judgment attachment or pre-judgment asset-freeze injunction to the Commission rather than to the Federal District Court hearing its suit, Hypercube seeks to avoid specific Supreme Court precedent. In *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc*., the Supreme Court held that, unless the plaintiff complies with the state pre-judgment attachment statutes, federal district courts have no authority to enter injunctions designed to restrain asset transfers by a defendant while an

---

[44] Hypercube Comments at 7-8.

[45] *Id*. at 2, 4, 7.

[46] *Id*. at 2.

unproven lawsuit by a plaintiff for money damages is pending.[47] In that case, the Supreme Court overturned a preliminary injunction freezing the cash proceeds of an asset sale while a plaintiff's unproven suit for money damages was pending – the precise situation applicable here.[48] Quoting a leading authority, the Supreme Court explained that allowing even a limited pre-judgment asset freeze (such as the escrow condition requested by Hypercube) would undermine the strict requirements of state pre-judgment attachment statutes and place a "powerful weapon of oppression" in the hands of "unscrupulous litigants:"

> A rule of procedure which allowed any prowling creditor, before his claim was definitely established by judgment, and without reference to the character of his demand, to file a bill to discover assets, or to impeach transfers, or interfere with the business affairs of the alleged debtor, would manifestly be susceptible of the grossest abuse. A more powerful weapon of oppression could not be placed at the disposal of unscrupulous litigants.[49]

The same rationale rebuts Hypercube's effort to get the Commission to impose some sort of escrow or injunctive requirement to further Hypercube's suit pending before the Federal District Court. Just as there is no statute or rule authorizing federal district courts to award pre-judgment injunctions restraining asset transfers absent compliance with the pre-judgment attachment statutes, there is no statute or rule authorizing the Commission to grant similar relief, whether as a condition of approval of an asset transfer under 47 U.S.C. § 214 or otherwise.

Even if Hypercube had found some authority for the extraordinary pre-judgment relief it requests from the Commission and not the Court, there would be no reason to grant that relief in this case, especially where there is not a substantial likelihood of success for Hypercube. As discussed above, Hypercube's claims against Comtel, Level 3, and DeltaCom have not gone well

---

47 *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc*., 527 U.S. 308, 330-31, 333 (1999) ("we hold that the District Court had no authority to issue a preliminary injunction preventing petitioners from disposing of their assets pending adjudication of respondents' contract claim for money damages.").

48 *Id*. at 310-313.

49 *Id*. at 328, 330-331 (quoting Wait, Fraudulent Conveyances § 73, at 110-111).

for Hypercube so far. In addition, Hypercube identifies no owners or controlling parties of Comtel with any history of running or engaging in improper business transactions. The substantial equity owners are disclosed in the transfer application.[50]

When the transaction closes, Comtel will receive cash in exchange for telecommunications assets. Hypercube professes concern with how Comtel will use the cash. However, the laws of Texas concerning distributions of assets by business entities to equity owners and fraudulent conveyances will apply.[51] Further, the Texas pre-judgment attachment statutes carefully balance the rights of alleged creditors who have not yet proven their claim, but fear assets will disappear from their reach while suit is pending, with the rights of defendants. The Texas pre-judgment attachment statutes impose stringent requirements, including that the plaintiff post a substantial bond to protect the defendant in the event the defendant prevails.[52] Fed.R.Civ.P. 64 incorporates the Texas pre-judgment attachment statutes into proceedings before federal district courts including the Texas Federal District Court in which Hypercube is suing Comtel.

While Hypercube sees those Texas creditor-protection laws as inadequate, that is not the view of the citizens of Texas as expressed in the laws enacted by their Legislature. Those Texas laws apply the appropriate level of protection to Hypercube's private interests that Texas has chosen to provide Texas citizens such as Hypercube who have not yet proven their claims against Texas citizens such as Comtel and may never do so. There is no reason for the Commission to intervene or upset the balance drawn by Texas or Fed.R.Civ.P. 64.

---

50 Application at 5-6.

51 *See e.g.*, TX Bus. Orgs. Code § 153.210 (prohibiting distribution of assets when liabilities exceed assets, whether or not limited partnership is being wound up); § 153.112 (providing only partial protection to limited partners from § 153.210 claims); § 153.504 (requiring payments to creditors ahead of payments to partners in the event a limited partnership is wound up); and TX Bus. & C. Code § 24.001 to 24.013 (Texas Uniform Fraudulent Transfer Act).

52 TX Civ Prac & Rem Code §§ 61.001, 61.002, 61.022, and 61.023.

The Commission's task in administering 47 U.S.C. § 214 is to protect the much broader ***public interest,*** particularly by ensuring that the transaction among telecommunications companies will not diminish competition or results in monopolies, or lead to inferior service to consumers. The Commission has no regulatory authority over the disposition of the cash that Comtel will receive, only the telecommunications assets (including customer base) that Comtel is transferring to Matrix. Hypercube has only its own private interests in what Comtel does with the cash proceeds of the sale. Hypercube has alleged no such public interests that would be impinged by the sale of telecommunications from Comtel to Matrix, and has conceded that Matrix is fit to acquire and operate those assets under 47 U.S.C. § 214 consistent with the public interest: "To be clear, Hypercube has every reason to believe that Matrix is a responsible and conscientious member of the Nation's telecommunications network."[53]

D. The FCC Should Decline to Act as Hypercube's Sales Force

As explained above, one of the key issues in Hypercube's lawsuit against Comtel is whether Hypercube can require Comtel to involuntarily purchase Hypercube's unwanted services. The District Court has articulated critical limitations on Hypercube's ability to force the purchase of its "services," and the case is focusing on those limitations. See Point II.A above.

Hypercube has the gall to request that the FCC condition approval of the transfer of assets from Comtel to Matrix on Matrix agreeing to enter into an "interconnection agreement" with Hypercube under which Matrix as an IXC would presumably be forced to purchase Hypercube's so-called services as a CLEC.[54] It is simply absurd for Hypercube to try to turn the Commission's Staff into Hypercube's sales force. If Hypercube wants to sell more of its service,

[53] Hypercube Comments at 6.

[54] *See id.* at 8.

it should lower its rates and offer genuinely helpful services that actually add value to the telecommunications network on terms and conditions that induce IXCs to voluntarily purchase them, or at least try to meet the conditions sets forth in the FCC's *7th and 8th Reports and Orders,* which set forth the limited scenarios in which a CLEC can force an IXC to purchase services.[55] Until Hypercube takes either step, Hypercube alone is responsible for the disputes that naturally result from its efforts to force IXCs to purchase its unnecessary and over-priced inserted-CLEC services.

E. Hypercube's Reference to Comtel's Informal Complaint Does Not Assist It

Comtel cannot fathom why Hypercube relies on its opposition to Comtel's motion for extension of time to convert Comtel's informal complaint against Hypercube (File EB-09-MDIC-0028) into a formal complaint as a basis for opposing a grant Section 214 transfer authority to Comtel and Matrix.[56] The Section 214 transfer application and the informal complaint are wholly unrelated. In any event, Hypercube's concerns regarding extension of time yet again lack merit. The Enforcement Bureau's Market Disputes Resolution Division on April 16, 2010 overruled Hypercube's opposition and granted Comtel's motion for extension of the due date to convert the informal complaint into a formal complaint.[57]

F. The Commission Has all Relevant Information Necessary to Approve the Application

The remaining conditions on transfer approval that Hypercube seeks all involve asking the Commission to delay processing the Application to get more "information" that Hypercube

---

55 *See 7th Report and Order* 16 FCC Rcd. 9923, 9960; *8th Report and Order*, 19 FCC Rcd. 9108, 9137-38.

56 *See* Hypercube Comments at 3.

57 Letter from Rosemary McEnery, Deputy Chief, Market Disputes Resolution Division, to James H. Lister, Counsel for Comtel, and Michael Hazzard, Counsel for Hypercube (File EB-09-MDIC-0028, April 16, 2010).

alleges the Commission should obtain.[58] Unlike the incomplete and misleading information provided by Hypercube, the Commission already has the information it needs to act on the Application. To the extent relevant at all, information regarding the private dispute between Hypercube and Comtel (and the parallel private disputes between Hypercube and Level 3 and Hypercube and DeltaCom) is readily available in several filings at the Commission by Hypercube, Comtel, Level 3, and DeltaCom in CC Docket 01-92 and by Comtel and Hypercube in Informal Complaint No. EB-09-MDIC-0028. Further, these Reply Comments thoroughly respond to Hypercube's Comments. As demonstrated above, Hypercube has raised no issues concerning competition, monopoly, or consumer protections or any other public interest issues at all.

CONCLUSION

This is not the first time a disgruntled litigant such as Hypercube has tried to take advantage of an unrelated pending asset transfer approval proceeding to try to gain leverage in its private dispute with one of the parties to the asset transfer. The Commission is well aware that substantial commercial transactions are time sensitive and that undue leverage can easily be obtained by causing delay through filing meritless objections to the transfer application. The Commission has consistently denied attempts by third parties to disrupt business transactions by turning the Section 214 process into a "forum to address or influence various disputes with one or the other of the applicants that have little if any relationship to the transaction or to the policies and objectives of the Communications Act."[59] Hypercube has raised no issues concerning competition, monopoly, or consumer protections or any other public interest issues at all. The Commission should reject Hypercube's efforts to delay the transaction, maintain the

[58] *See* Hypercube Comments at 6-7.

[59] *AOL/Time Warner Order*, 16 FCC Rcd 6547, 6550 (2001).

Application on the streamlined track, and grant Comtel and Matrix domestic and international authority under 47 U.S.C. § 214 to complete the transfer of assets that is the subject of the Application in this proceeding.

Dated: April 20, 2010

Signature Block Corrected and Refiled:
Dated: April 22, 2010

Respectfully submitted,

/s/James H. Lister

James H. Lister
Charles R. Eberle
Birch, Horton, Bittner and Cherot, P.C.
1155 Connecticut Avenue, N.W., Suite 1200
Washington, D.C. 20036
Telephone: (202) 659-5800
Facsimile: (202) 659-1027
jlister@dc.bhb.com
ceberle@dc.bhb.com

Co-Counsel for Comtel Telcom Assets LP and Comtel Virginia LLC, Assignors